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A Penny for Your Thoughts, a Pound for Your Flesh: Implications of recognizing property rights in our own excised body parts

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Abstract

The implications of recognizing property in our own excised body parts are vast and far reaching, involving ethical, legal and practical issues that cut across many aspects of modern social intercourse and legal regulation. Arguments both for and against such recognition are well rehearsed; enough has been written to fill a small library, or at least a large bookshelf. A significant portion of the work considers the role and impact of such recognition on human dignity. Indeed, given the special status accorded the human body, it is impossible to avoid human dignity and its interaction with the various choices presented by the adoption of a property model. However, reference to this general ethical value is of little assistance. Here, the ethical foundation of a property model is considered within the context of medical ethical four principles, namely autonomy, beneficence, non-maleficence and justice. If such a model promotes these principles, it can be ethically defended. The primary implication of recognizing property in our own excised body parts – the emergence of transactions relating to such parts as between originators and third parties – is assessed against these principles and found to be ethically defensible. In the course of that assessment, many of the derivative implications of adopting such a system (procurement, risk, allocation) are discussed. The necessary alterations to or limitations of the more purely property law principles are also briefly considered, namely issues of title, transfer, valuation and quality. The paper concludes that a property model is ethically supported and legally manageable, and, despite the near impossibility of seeing it come to fruition, it may be the only way to truly engage potential “donors” and recognize in them the same value and rights currently enjoyed by other actors in the body part industry.

Keywords

Genetics, human tissue, transplantation, property, property in the body, values, ethics, law

INTRODUCTION

“... *The pound of flesh ... is dearly bought, is mine, and I will have it.*”¹

Social organization introduced human subjugation and the enduring struggle to control our bodies.² Modern medical science has introduced previously unimagined avenues of physical investigation, interference and exploitation, expanding that struggle to some fantastic/macabre issues which have significant social implications.³ It has irrevocably altered the limits of medicine, necessitating a “reconstitution of the body”⁴ and forcing us to reconsider our relationship and that of others to our bodies and parts thereof and the value of same to ourselves and society, both in life and death.⁵ Rights of control over our bodies are now claimed by “originators”⁶ in relation to:⁷

- (1) living bodies (ie: interaction between doctors and patients in the medical context);
- (2) living excised body parts (“EBPs”)(ie: organs, organ fragments and systems from our living body and our recently deceased corpse);
- (3) living excised body tissues (“EBTs”)(ie: tissue/genetic samples, sperm/egg specimens, etc.); and

¹ W. Shakespeare, *The Merchant of Venice*, Act 4, Scene 1.

² An early example is slavery. A more recent example is women. See E. Richardson & B. Turner, “Bodies as Property: From Slavery to DNA Maps” 29-42, and A. Bottomly, “The Many Appearances of the Body in Feminist Scholarship” 127-148, both in A. Bainham *et al.* (eds.), *Body Lore and Laws* (Oxford: OUP, 2002). Bottomly notes that women have long been trying to establish ownership over their bodies and control over their bodily functions.

³ Examples of advanced interference include our new capacity to (1) relocate parts of a body to other parts (skin grafting), (2) harvest, store and transplant them in other people (blood, bone marrow, reproductive material and organs), and (3) identify and alter base genetic material (gene mapping and sequencing). These advances are accompanied by social, moral and ethical changes, a dynamism which is essential to a pluralist society: K. Mason & G. Laurie, “Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey” (2001) 64 Mod. Law Rev. 710-729, at 710, and M. Freeman, “Does Surrogacy Have a Future After Brazier?” (1999) 7 M.L.R. 1-26.

⁴ D. Morgan, “Science, Medicine and Ethical Change” in A. Bainham *et al.* (eds.), *supra*, note 2, 329-342, at 329, and W. Strong & S. Lynch, “Ethical Issues in Living Related Donor Liver Transplantation” in A. Caplan & D. Coelho (eds.), *The Ethics of Organ Transplants* (NY: Prometheus Books, 1998) 41-47, at 41.

⁵ An example of such a re-evaluation is the Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London: Nuffield Council, 1995). (“Nuffield Report”)

⁶ “Originator” refers to the donor or original possessor (as a living whole) of the excised body part or tissue.

⁷ See E. Richardson & B. Turner, *supra*, note 2.

- (4) corpses (ie: disposition of our remains).

The law must respond to and offer guidance in these circumstances, but it lags behind medical science in its regulation of practices and arbitration of claims.⁸ Piecemeal attempts at regulation have resulted in a morass of conventions, laws, codes, rules, circulars and practice notes from a host of international, national, municipal, professional and advisory bodies, all of which are “obituaries for activities that began long ago”.⁹

Although increased originator control over and rights in EBPs need not be premised on property,¹⁰ the concept is not new, having been formulated by Locke, and is a likely solution.¹¹ As such, this paper considers the implications of recognizing originator property claims over their own EBPs. However, because the implications are so numerous and wide ranging, the assessment is limited to those issues surrounding a single implication, namely the emergence of a market in EBPs wherein originators are active participants capable of entering into primary transactions with respect to their EBPs. Although a property model need not inevitably lead to commerce, the likelihood of it doing so is overwhelming.¹² This is supported by the thriving illegal market that already exists,¹³ the great financial rewards that can be derived from the use of EBPs/EBTs,¹⁴ and the alleged absence of any principled reason barring a court from viewing EBPs as property and finding equitable solutions for dividing the “spoils”.¹⁵ Thus, an “organ trade” is the most obvious implication and will be assessed by:

- (1) offering an ethical foundation for an EBP market (which will address practical implications such as procurement, participant risk and allocation); and
- (2) identifying the special implications of and for such markets to property law (which

⁸ P. Matthews, “The Man Of Property” (1995) 3 M.L.R. 251-274, at 251, notes that as old things disappear (ie: importance of religion) and new things appear (ie: transplantation), existing rules become inadequate.

⁹ J. Black, “Regulation as Facilitation: Negotiating the Genetic Revolution” in R. Brownsword *et al.* (eds.), *Law and Human Genetics: Regulating A Revolution* (Oxford: OUP, 1999) 29-68, at 29.

¹⁰ D. Beyleveld & R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: OUP, 2001), c. 8.

¹¹ J. Harris, “Who Owns My Body?” (1996) 16 Oxford J.L.S. 55-84, at 68.

¹² P. Matthews, *supra*, note 8, at 272-273.

¹³ Berkeley, <http://sunsite3.berkeley.edu/biotech/organswatch> (Oct. 11/05).

¹⁴ A. Grubb, “The Nuffield Council Report on Human Tissue” (1995) 3 M.L.R. 235-236, at 235.

¹⁵ Commentary, “Theft of Body Parts: Property & Dead Bodies” (1998) 6 M.L.R. 247-253, at 251.

will comprise issues of title, transfer, value and quality).

It is expected that this substantive assessment will demonstrate that a *sui generis* property system, relying on unique limitations, is ethically defensible and practically manageable. Before embarking on this assessment, however, a brief review of the existing legal regime is warranted.

ANALYSIS

“In an era when parts can be routinely detached from one body and plugged into another; ... when a foetus can be nurtured in an artificial womb, or jobbed out to a surrogate mother; ... when we ... rebuild faces, breasts or thighs to conform to the moment’s ideal of beauty – the concepts and definitions, values and beliefs, rights and laws, must be radically overhauled.”¹⁶

I. THE EXISTING LEGAL POSITION – NO PROPERTY / NO BENEFIT.

A detailed analysis of the existing legal regime governing bodily control is not within the purview of this paper. Suffice to say, the claimed guiding principle is that there is no property in the body. This principle finds its origins with Coke,¹⁷ whose *dicta* found voice in cases such as *R. v. Sharpe*,¹⁸ *R. v. Price*,¹⁹ and *Williams v. Williams*.²⁰ Both the historical foundation of the principle and its propriety in the modern context have been questioned,²¹ and, in any event, it is not consistently applied:

¹⁶ W. Ewing, *The Body: Photographs of the Human Form* (San Francisco: Chronicle Books, 1994), at 9-10.

¹⁷ According to P. Skegg, “Human Corpses, Medical Specimens and the Law of Property” (1975) 4 Anglo-Am. Law Rev. 412, Coke stated, “The burial of the cadaver (that is *caro data vermibus*) is *nullius in bonis*.”

¹⁸ (1857), 169 E.R. 959.

¹⁹ (1884), 12 Q.B.D. 247.

²⁰ [1881-85] All E.R. 840.

²¹ K. Mason & G. Laurie, *supra*, note 3, indicate that the early cases misinterpreted or misapplied the principle, the applicability of which they question. See also Commentary, *supra*, note 15.

- **Corpses:** In *Doodeward v. Spence*,²² the Court recognized third party “ownership” in preserved bodies where some minimal skill had been applied such that they acquired different attributes. The *Human Tissue Act 2004* (“HTA 2004”),²³ assented to on November 15, 2004, and scheduled to come fully into force in April 2006, preserves this exception to the “no property” rule.²⁴ In addition, it permits possession (“storage” and “use”) of the body of a deceased person by persons licensed by the new Human Tissue Authority,²⁵ and relies on language of “donation” (which assumes some element of ownership).²⁶
- **Products:** In *R. v. Herbert*²⁷ (cut hair), *R. v. Welsh*²⁸ (urine sample) and *R. v. Rothery*²⁹ (blood sample), actions in theft were sustained against those who stole products of the body from those in lawful possession of same.
- **EBTs:** In *Moore v. Regents of the University of California*,³⁰ the Court held that a third party could have a proprietary interest in EBTs, basing this conclusion in part on (1) its view that a cell-line is distinct from the original cells, and (2) its concern that research not be hindered by restricting access to “raw material”. The HTA 2004 permits licensed persons to remove, store and use “relevant material” (material, other than gametes, which consists of or includes human cells, but does not include embryos outside the human body or hair and nails from the body of a living person³¹) for a number of purposes, which include, *inter alia*, obtaining scientific or medical information about a living or deceased

²² (1908), 6 C.L.R. 406 (Aust. H.C.), approved in *R. v. Kelly*, *infra*, note 34.

²³ (UK), 2004, c. 30. Prompted by the Bristol Royal Infirmary and Alder Hey scandals, the HTA 2004 repeals and replaces, *inter alia*, the *Human Tissue Act 1961*, the *Anatomy Act 1984* and the *Human Organ Transplants Act 1989*. It identifies the purposes for which corpses can be stored and used and for which human organs and tissue can be removed (from corpses and living persons), stored and used, and it erects the Human Tissue Authority, which has guidance, licensing and oversight responsibilities. For more on the HTA 2004 and the new regime, see www.opsi.gov.uk/acts/en2004/2004en30.htm and www.dh.gov.uk/assetsroot/04/10/36/86/04103686.pdf.

²⁴ HTA 2004, ss. 32(9) and (10), which are already in force, except from the prohibition in commercial dealing in human tissue material which is the subject of property because of an application of human skill.

²⁵ HTA 2004, ss. 1(1), (2), (3) and Schedule 1.

²⁶ HTA 2004, s. 8.

²⁷ (1961) 25 J. of Crim. Law 163. A lock of Byron’s hair was sold at Sotheby’s Auction House in 1970 for £320: P. Skegg, *supra*, note 17.

²⁸ [1974] R.T.R. 478 (C.A.).

²⁹ [1976] R.T.R. 550 (C.A.).

³⁰ (1990), 793 P. 2d 479 (Cal. S.C.), reversing (1988), 249 Cal. R. 494 (C.A.).

³¹ HTA 2004, s. 53.

person, research, and transplantation.³² One can infer that storage and usage rights visit upon licensed persons certain proprietary rights, and that interference with those rights will result in legal consequences.

- **EBPs:** In *Dobson v. North Tyneside Health Authority*³³ and *R. v. Kelly*³⁴ the Courts recognized property rights in EBPs where they had been subjected to dissection, preservation or otherwise acquired different attributes by the application of skill. Those who apply such skill (ie: doctors, researchers, etc.) obtain title and can transfer same to successors in title. In addition, the Secretary of State has statutory power to charge for body parts not readily available to any person,³⁵ certain (US) organizations acquire EBPs and supply them to researchers on a commercial basis,³⁶ and both transplant services and pituitary glands from cadaver brains are sold commercially.³⁷

In short, property concepts and property rights pervade the law governing the human body, but property rights are generally denied to originators. This led Broussard J., dissenting in *Moore v. Regents of the University of California*, to observe that, “the majority’s analysis cannot rest on the broad proposition that a removed part is not property, but ... on the proposition that a *patient* retains no ownership interest in [an excised] body part”

The legal position of originators in relation to primary EBP transactions will also be governed by the HTA 2004. The HTA 2004 refers to “controlled material”, which is defined as any material which consists of or includes human cells, is (or is intended to be) removed from the human body, is intended for transplantation and is not gametes, embryos or material which is the subject of property because of the application of human skill.³⁸ Sections 32 and 33 of the HTA 2004 make it an offence to:

³² See Schedule 1 of the Act.

³³ [1996] 4 All E.R. 474 (C.A.).

³⁴ [1998] 3 All E.R. 741 (C.A.).

³⁵ See s. 25 of the *National Health Service Act 1977* (U.K.), 1977, c. 49, and P. Matthews, “Whose Body? People As Property” (1982) 36 *Current Legal Problems* 193-239, at 225.

³⁶ G. Dworkin & I. Kennedy, “Human Tissue: Rights in the Body and Its Parts” (1993) 1 *M.L.R.* 291-319, at 305, cite the International Institute for the Advancement of Medicine and Human Biologics Inc.

³⁷ L. Lehtonen, “The Bioethics Convention of the Council of Europe and Organ Sharing for Transplant Recipients in Scandinavia” (2002) 21 *Med. Law* 745-751.

³⁸ HTA 2004, ss. 32(8) and (9), and s. 33(7). These more inclusive definitions replace the definition of “human organ” in s. 7(2) of the *Human Organ Transplants Act*, which meant any part of the body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated.

- give or receive a reward for the offer to supply or supply of a controlled material;
- receive a reward to seek a supply for a controlled material;
- initiate or negotiate transactions for reward concerning a controlled material;
- manage or control an organization pursuing such transactions for reward;
- publish or distribute an advertisement inviting such transactions for reward;
- remove transplantable material from the body of a living person, subject to exceptions;³⁹
- use transplantable material from the body of a living person, subject to same exceptions.

“Reward” is defined as “any financial or other material advantage”,⁴⁰ but does not include money or money’s worth to the holder of a license as consideration for transporting, removing, preparing, preserving or storing controlled material, nor expenses incurred by third parties for these same activities, nor does it include the reimbursement of expenses or lost earnings incurred by the originator, so far as reasonably and directly attributable to the supply of the material.⁴¹

This “no property” position is fortified by the Nuffield Report,⁴² the Biomedicine Convention⁴³ and its Additional Protocol,⁴⁴ Medical Research Council Guidelines,⁴⁵ and General Medical Council Guidelines,⁴⁶ and is defended by arguments like the following:

... It [a transaction for reward] reflects a commodification of bodies, a dilution of altruism, and it fails to meet both logical and economic objections. For example,

³⁹ The exception is articulated in HTA 2004, s. 33(3), which states that the Secretary of State may lift the operation of the offence where the Authority is satisfied that no reward has been given, such other conditions as are specified are satisfied, and such other requirements as are specified are complied with.

⁴⁰ HTA 2004, s. 32(11).

⁴¹ HTA 2004, ss. 32(6) and (7).

⁴² *Supra*, note 5. For a critique of this, see P. Matthews, *supra*, note 8, who concludes that it relies on property and a complex of other areas of law with bald conclusionary leaps, all intended to ensure that the one person who has no property in her EBP is the originator (ie: it erects presumptions of abandonment and makes broad interpretations against the donor as to the meaning and content of consent).

⁴³ Convention for the Protection of Human Rights and Dignity of the Human Being With Regard to the Application of Biology and Medicine, E.T.S. 1997, No. 164. Article 21 states that “the human body and its parts shall not, as such, give rise to financial gain”.

⁴⁴ Additional Protocol of the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, E.T.S. 2002, No. 168. Article 21 reiterates the prohibition on financial gain with some qualifications, and Article 22 prohibits organ trafficking.

⁴⁵ MRC, *Human Tissue and Biological Samples for Use in Research: Operational and Ethical Guidelines* (2001), Part 2.

⁴⁶ GMC, *Guidance for Doctors on Transplantation of Organs from Live Donors* (1992).

voluntary consent to sale would be self-refuting as the organs would come from those who (a) were economically coerced, (b) had a hopelessly misguided perception regarding the transaction, or (c) were reasonably wealthy but obsessively concerned with accumulating money at any price. None of these categories should be considered as an acceptable basis for the distribution of transplant organs.⁴⁷

One implication of recognizing originator property in EBPs would be the necessary reform of the HTA 2004 and the rationalization of the many international and domestic instruments and guidelines which impact on body control. A uniform theoretical foundation to all rights in the body and EBPs (by originators and third parties) would have to be formulated.

II. ETHICAL FOUNDATION FOR RECOGNIZING PROPERTY IN OUR EBPs.

Any activity closely linked with bodily integrity, medicine and healthcare must be ethically supported, particularly where science, research and business converge.⁴⁸ Thus, the greatest implication of (and hurdle to) recognizing originator property rights and primary transactions in EBPs is that of ethical grounding; the need to debunk current ethics-based reactions antagonistic to a property model on the one hand and to support the property model with a sound ethical foundation on the other.

Ethical debates about EBPs often turn on considerations of “human dignity”, which is premised on the idea that every human being, regardless of status or capacity, has inherent value and the right to be treated as having worth.⁴⁹ It is enshrined in most religions,⁵⁰ cultures⁵¹ and

⁴⁷ D. Lamb, *Organ Transplants and Ethics* (Aldershot: Avebury, 1996), at 138.

⁴⁸ L. Bently & B. Sherman, “The Ethics of Patenting: Towards a Transgenic Patent System” (1995) 3 M.L.R. 275-291, agree, noting the ambivalence toward or suspicion of science and big business, and suggesting that even the law is finding it more and more difficult to place trust in the scientific community.

⁴⁹ D. Beyleveld & R. Brownsword, *supra*, note 10, at 15-17, and P. Walsh, “Principles and Pragmatism” (1995) 3 M.L.R. 237-250.

⁵⁰ Self-mutilation is widely forbidden on the ground that it is an affront to damage the body, which ultimately belongs to God or over which God exercises final authority: D. Lamb, *supra*, note 47, at 105.

⁵¹ Most people’s sense of personal identity, regardless of origin, is strongly bound to their bodies: see N. Zohar, “Toward Justice in the Organ Trade” (1993) 27 Is. L.R. 541-565, at 551.

legal traditions,⁵² and has resulted in special status being accorded to the body.

Antagonists to the property model argue that human dignity and the concomitant status of the body precludes identifying EBPs as property subject to primary transactions, because such identification “instrumentalizes” the body, treating it as a means (or object) rather than an end.⁵³ Thus, they use dignity to justify constraints on activity. However, over reliance on human dignity to impose constraints is problematic because this same principle can simultaneously support opposing claims and views.⁵⁴ For example, human dignity can be viewed as an empowering principle. As such, it grounds autonomy.⁵⁵ One could argue that failure to respect one’s freely entered contracts (which result in no harm to others), even where they concern transactions considered undignified, treats one as an object and offends autonomy and thus dignity.⁵⁶

The tension between these two positions is exemplified by *R. v. Brown*,⁵⁷ wherein consenting adults participating in physically abusive sado-masochism were charged under the *Offences Against the Person Act 1861*. The majority, relying on dignity, held that the prohibition against such activity is for the protection of society (which views the infliction of pain as evil) and society’s basic values.⁵⁸ Lord Mustill, dissenting, also recognized the role of dignity, holding:

... [T]he state should interfere with the rights of an individual ... no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of ... the populace at large.⁵⁹

The accuseds appealed to Strasbourg, but the majority held that Article 8 (private life) of the European Convention on Human Rights⁶⁰ (“ECHR”) could not be stretched to protect one’s

⁵² See, for example, the Preamble to the Biomedicine Convention and other international instruments.

⁵³ The idea that humans must be treated as ends in themselves, not as means to an end or someone else’s end originates with Kant: see D. Beyleveld & R. Brownsword, *supra*, note 10, at 87-110.

⁵⁴ See M. Bedjaoui, *Proceedings of the Third Session of the International Bioethics Committee of UNESCO*, September 1995, vol. 1, at 144, D. Beyleveld & R. Brownsword, “Human Dignity, Rights and Genetics” 69-88, at 88, and A. Pottage, “The Inscription of Life in Law: Genes, Patents and Bio-politics” 148-173, at 155, both in R. Brownsword *et al.* (eds.), *supra*, note 9, who note the weaknesses of deploying human dignity as a constraint on practices that are intuitively disliked.

⁵⁵ See D. Beyleveld & R. Brownsword, *supra*, note 10, at 22-25, H. Hart, *Law, Liberty and Morality* (Oxford: OUP, 1963), and A. Gewirth, *Reason and Morality* (Chicago: UCP, 1978).

⁵⁶ D. Beyleveld & R. Brownsword, *supra*, note 54, at 79.

⁵⁷ [1993] 2 All E.R. 75 (H.L.).

⁵⁸ *Ibid.*, at 84.

⁵⁹ *Ibid.*, at 116.

⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 1950, no. 5.

immorality.⁶¹

Given the dualistic nature of “human dignity”, it is more useful to measure the extension of property rights against four commonly used principles of bioethics – (1) autonomy, (2) beneficence, (3) non-maleficence and (4) justice – which are themselves grounded in or sensitive to “human dignity.”

(1) Autonomy

The many definitions of autonomy rest on the worth of individuals.⁶² Its central concept is that one’s body is a central part of oneself and control over same is integral to individual integrity, even though that control may result decisions/actions which lead to death.⁶³ Comprising physical, emotional, economic and legal liberty and the right to be free from coercion re: same,⁶⁴ autonomy is generally considered the most fundamental of the ethical principles where it is exercised with due regard to the rights of others and society.⁶⁵ It is argued that respect for autonomy enhances dignity:

... [S]urrendering one’s body parts and transferring one’s rule-preclusionary control from oneself to another ... cannot, *as such*, violate dignity as the ground of generic rights, since not to grant this power to agents is to violate their generic rights. Furthermore, we fail to see how such actions could *per se* violate dignity as a virtue – after all, if this were possible then it must be contrary to dignity as a virtue (or the ground of generic rights) to donate a kidney to save the life of another.⁶⁶

⁶¹ *Brown et al. v. U.K.* (1997), 24 E.H.R.R. 39 (E.C.H.R.). Another example of the clash between interpretations of human dignity is the dwarf-throwing case discussed in D. Beyleveld & R. Brownsword, *supra*, note 10.

⁶² See T. Beauchamp & R. Faden, *The History and Theory of Informed Consent* (Oxford: OUP, 1986), at 7, G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: CUP, 1988), at 6, and O. O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: CUP, 2002), at 23.

⁶³ See *Re C (Adult: Refusal of Treatment)*, [1994] 1 W.L.R. 290 (H.L.), and an abundance of academic work, including K. Mason & G. Laurie, *Mason & McCall Smith’s Law and Medical Ethics*, 7th ed. (Oxford: OUP, 2006).

⁶⁴ S. Aksoy & A. Elmali, “The Core Concepts of the ‘Four Principles’ of Bioethics as Found in Islamic Tradition” (2002) 21 Med. Law 211-224.

⁶⁵ See J. Harris, *supra*, note 11, at 62, R. Scott, *Rights, Duties and the Body* (Oxford: OUP, 2002), at 11 & 14, and the limitations placed on unfettered individual rights in Article 8 of the ECHR (and other ECHR rights).

⁶⁶ D. Beyleveld & R. Brownsword, *supra*, note 10, at 192, who conclude that being both means and end does not affront dignity.

In the medical context, autonomy, which finds legal expression in the requirement for consent, enables a person to decide what treatment or bodily interference she will accept.⁶⁷ Limits on consent are acceptable, but must be minimal and ethically grounded. In the context of excision of body parts for transplantation purposes, an originator's decision can be characterized as ethically autonomous where the following are present:⁶⁸

- (1) knowledge and understanding of (a) the nature of the procedure, (b) the physical risks of same, (c) likely short- and long-term health consequences, and (d) quality of life prospects;⁶⁹
- (2) voluntariness and an absence of coercion;⁷⁰ and
- (3) legal capacity and mental competence.⁷¹

In the context of EBP transactions, the ethical formulation of autonomy can be said to have been fulfilled where originators meet or comply with these conditions.

The primary charge against the existence of autonomy is coercion (a failure at factor (2)). Antagonists argue that (1) it is primarily the poor who will sell EBPs, and their economic position negates free will (ie: they are coerced by the offer of money and are exploited on the basis of their financial position), and (2) recognizing property in EBPs might lead to crime (forced removals) and is the first step in a slippery slope to slavery.

On the first point, there is no evidence that people in financial difficulty cannot make reasoned, autonomous decisions regarding money (or their body); they frequently make difficult

⁶⁷ See K. Mason & G. Laurie, *supra*, note 63.

⁶⁸ See R. Strong & S. Lynch, *supra*, note 4, at 43.

⁶⁹ See Articles 20 and 25 of World Medical Association, *Statement on Human Organ & Tissue Donation & Transplantation* (52nd WMA General Assembly, October 2000) at www.wma.net/e/policy/uma.htm (Feb. 18/04). See also ss. 3(2)(a) and (b) of the old HOTA Regulations.

⁷⁰ Consent is addressed in Article 5 of the Biomedicine Convention and Articles 11, 12, 13 of the Additional Protocol. See also Article 23 of the WMA Statement, *ibid*, and ss. 3(2)(c) and (d) of the HOTA Regulations.

⁷¹ A concept with which physicians and lawyers are well acquainted, and which is well established in property and sale of goods law: see H. Beale (gen. ed.), *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999), at ch. 8 and ch. 43. It is addressed by Articles 6 and 7 of the Biomedicine Convention and Article 14 of the Additional Protocol.

decisions within their limited options:

... [A]ll human actions take place under certain constraints and pressures, frequently with direct ramifications for the actors' well-being, and even survival. In the face of scarcity and ... dangers, people regularly struggle against natural and social realities; insofar as there is human freedom, this is its basic condition. Thus, even presuming that the would-be vendor is aiming to avoid starvation, it is far from clear why this motivation renders the deed less voluntary than other common acts.

* * *

... [W]hat forces [the vendor's] hand is not the offer to buy his kidney (or labor), but rather his grim background conditions, the realities of scarcity. And as long as these conditions exist, it is hard to see how the buyer's offer can be condemned on the grounds of "coercion".⁷²

The global capitalized social structure chosen by (imposed on) us, which provides the comforts of life and the luxury of choice unevenly, should not be used to deny people the few choices they might have because of the very economic situation forced upon them.⁷³ Given their position, it is not ethically appropriate to further limit their choice:

Consider unskilled laborers in desperate poverty, willing to be hired for twelve-hour workdays at below the minimum wage. If we forbid this, ... we leave these people unemployed and even worse off. ... If there are people in desperate need, their co-members [in society] with means are morally bound to help them [B]anning organ sales [however] is not likely to be joined to an effort to alleviate the desperate conditions of prospective vendors. ...⁷⁴

⁷² N. Zohar, *supra*, note 51, at 552 & 554.

⁷³ An argument made by Marx in relation to labour and by J. Radcliffe-Richards *et al.*, "The Case For Allowing Kidney Sales" (1998) 352 *Lancet* 1950-1952, in the context of EBP sales.

⁷⁴ N. Zohar, *supra*, note 51, at 562. A. Barnett *et al.*, "Improving Organ Donation: Compensation versus Markets" in

In any event, EBP sales may not be limited to the poor. Wealthy, informed, rational originators may also consent to primary transactions.⁷⁵

Further, the current practice of seeking EBPs from living related donors does not protect originators from coercion. Donors are subject to a more insidious coercion in the form of psychological pressure, self-imposed or exerted by other family members.⁷⁶ Indeed, antagonists' autonomy/consent arguments against primary transactions are equally applicable to present practices.⁷⁷

On the second point, primary transactions in EBPs are qualitatively different from slavery,⁷⁸ which is clearly outlawed.⁷⁹ They involve the *voluntary* use of the originator's EBPs *for the profit of the originator*. With respect to criminal procurement, existing criminal and civil laws prohibit and provide remedies for the type of activities that would be necessary to pursue such a course. Further, it takes a high degree of expertise to usefully extract an organ for transplantation. This, combined with short warm anoxic times, hospitalization needs and storage requirements are not conducive to a burgeoning illegal procurement system (based on kidnapping), which has never been substantiated.⁸⁰ It is further argued:

[I]t is unreasonable to justify the banning of an activity which may bring relief ... and save ... life, on the basis of a concern that criminal activity may develop around it. A properly ordered society deals with these risks and does not desist from pursuing vital activities because of them.⁸¹

A. Caplan & D. Coelho (eds.), *supra*, note 4, 208-218, at 213, also point out that economic conditions, not the market, is the source of exploitation.

⁷⁵ See S. Wilkinson & E. Garrard, "Bodily Integrity and the Sale of Human Organs" (1996) 22 J.M.E. 334-339.

⁷⁶ See D. Lamb, *supra*, note 47, at 107, J. Radcliff-Richards *et al.*, *supra*, note 73, L. Ross *et al.*, "Ethics of Paired-Kidney-Exchange Program (1997) 336 N.E.J.M. 1752-1755 (citing several studies), A. Campbell *et al.*, *Medical Ethics*, 2nd ed. (Oxford: OUP, 1998), at 57, and J. Kahn, "Would You Give a Stranger Your Kidney? The Ethics of 'Unknown' Kidney Donors" (1988) at www.cnn.com/HEALTH/bioethics/9807/stranger.kidney (Feb. 18/04).

⁷⁷ As argued by S. Wilkinson & E. Garrard, *supra*, note 75.

⁷⁸ G. Laurie, *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge: CUP, 2002), at 317.

⁷⁹ See P. Matthews, *supra*, note 8, and Article 4 of the Universal Declaration of Human Rights (1948), and Article 3 of the European Convention on Human Rights (1950).

⁸⁰ B. Cohen *et al.*, "Commerce in Transplantation: How Does it Affect European Legislation?" (2000) 14 Clin. Trans. 28-31.

⁸¹ J. Weisman, "Organs As Assets" (1993) 27 Is. L.R. 610-623, at 617.

We do not ban land ownership because it could lead to trespass or sexual intercourse because it could lead to rape, so a ban on freely entered into primary transactions because it could lead to crime is an unwarranted restriction on autonomy. Regardless, it is within the capacity of the legal system to erect safeguards to limit crime and ensure genuine consent.⁸²

The above demonstrates that there is ethical support for a property model permitting primary transaction in EBPs in that it would permit informed originator's to exercise autonomous judgment (thereby promoting human dignity) to perform an act that does not injure others.

(2) Beneficence

In the medical context, beneficence often relates to treating and healing patients. However, it can encompass acts of kindness, mercy, charity, altruism, love and humanity more generally; the promotion of the welfare of others.⁸³ Beneficence therefore requires us to consider the plight of the patient, the one person we know to be in need of compassion and acts of welfare promotion.

World-wide EBP demand/need exceeds supply and the gap is growing.⁸⁴ For example, it has been reported that there are 40,000 patients waiting for a kidney in Western Europe alone.⁸⁵ In addition, the growing waiting lists mean that more patients die waiting. For example, in the UK, in 1998, 4,640 patients were on waiting lists.⁸⁶ In Europe, by 2010, the wait could be 10 years and already 15% to 30% of patients die waiting.⁸⁷ Further, transplants are almost always preferred to other forms of treatment (ie: kidney transplants provide a better quality of life than dialysis and cost less than alternative chronic therapy).⁸⁸

Despite this situation, antagonists lament that an EBP market would reduce altruism and

⁸² S. Wheatley, "Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine" (2001) 3 E.H.R.L.R. 312-325.

⁸³ S. Aksoy & A. Elmali, *supra*, note 64.

⁸⁴ M. Revel, "Research on Animal Cloning Techniques and their Implications in Medical Ethics: An Update" (2000) 19 Med. Law 527-543.

⁸⁵ R. Vermot-Mangold (Rapporteur), "Trafficking in Organs in Europe" (2003) Doc. 9822. In the USA, organ demand is critical and even a 20% increase in donations would only dent the need: J. Kahn, *supra*, note 76.

⁸⁶ J. Montgomery, *Health Care Law*, 2nd ed. (Oxford: OUP, 2003), at 443. In the USA, 70,000 patients sit on waiting lists and more than 12 die every day because vital organs are unavailable: R. Shapiro, "Legal Issues in Payment of Living Donors for Solid Organs" (2003) Human Rights 19-20.

⁸⁷ R. Vermot-Mangold (Rapporteur), *supra*, note 85, and A. Rogers, "European Health Ministers Split Over Organ Trafficking" (2003) at www.thelancet.com/search/search/isa (Feb. 10/04).

⁸⁸ D. Lamb, *supra*, note 47, at 11-12, says a successful transplant with 1-year post-operative therapy costs less than a single year of dialysis. In 1983, transplantation cost US\$5,000-US\$8,000; dialysis cost US\$35,000 annually.

solidarity and destroy the spiritual structure upon which organ transplantation is based.⁸⁹ However, one can question both the “spiritual structure” of current practices,⁹⁰ and the analogy to the blood market.⁹¹ Further:

- The existence of a market does not preclude purely altruistic gifting, which could still be encouraged.⁹²
- The existence of payment does not negate concern for others or the feelings of solidarity and responsibility originators may feel knowing they helped another.⁹³
- The EBP sale may well be made by the originator for an altruistic purpose (ie: the money received may be used for the medical treatment or the education of another).⁹⁴
- We do not extend this reasoning to doctors, who are paid for their services, and few would suggest that their actions never comply with the principle of beneficence.

Some argue:

... [T]here is something suspect about telling people that their contributions will be devalued if paid for. ... [M]any people who are paid for their work at the same time feel that they are making a valuable contribution. When great sums are paid for works of art, this is hardly a sign or a cause of diminishing their intrinsic value or our respect for those who produce them. Opposition to “commodification” thus sometimes sounds ... like clamoring to continue getting something for free, and trying to press its providers into moral service.⁹⁵

⁸⁹ Citing R. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (NY: Pantheon Press, 1971).

⁹⁰ See N. Goolam, “Human Organ Transplantation: Multicultural Ethical Perspectives” (2002) 21 Med. Law 541-548, at 544.

⁹¹ See N. Zohar, *supra*, note 51, at 563.

⁹² K. Mason & G. Laurie, *supra*, note 3, at 728.

⁹³ D. Beyleveld & R. Brownsword, *supra*, note 10, at 42.

⁹⁴ A. Campbell *et al.*, *supra*, note 76, at 57. In any event, the death of altruism means little when patients are dying on waiting lists because of an already existing dearth of altruism.

⁹⁵ N. Zohar, *supra*, note 51, at 564-565. See also M. Radin, “Justice and the Market Domain” in J. Chapman & J.

The law's recognition of the sanctity of life,⁹⁶ and the cross-cultural agreement that one must make every effort to save life,⁹⁷ combined with the above supports a utilitarian approach toward achieving beneficence, which approach is achieved by a property model which allows originator transactions.

(3) Non-Maleficence

Non-maleficence is often defined as doing nothing which causes injury. A more contextual approach directs people to be compassionate and generous.⁹⁸ Consideration of this principle in the context of EBPs requires a focus on the risk to the originator.

Antagonists argue that this principle bars physicians from excising parts/organs intended for sale because there is no therapeutic benefit to originators; it is mutilation, which is socially unacceptable. However, the following invalidate this argument:

- As a matter of law and policy transplants are accepted, as are the concomitant risks they represent to originators.⁹⁹
- The existence of donation, transplant technology, demand exceeding supply and the existence of a worldwide market economy (which naturally responds to supply deficits with monetary inducements), has made EBP sales impossible to prevent.¹⁰⁰ Originators willing to sell their EBPs despite the illegality of doing so are driven into the unregulated

Pennock (eds.), *Markets and Justice* (NY: NY U. Press, 1989) 165-197, at 175, and R. Arneson, "Commodification and Commercial Surrogacy" (1992) 21 Phil. & Pub. Aff. 132-164.

⁹⁶ As enunciated in *Airedale NHS Trust v. Bland*, [1993] 1 All E.R. 821 (H.L.), *Re B (Minor)(Wardship: Medical Treatment)*, [1990] 3 All E.R. 927 (C.A.), *An Hospital NHS Trust v. S. et al.*, [2003] E.W.H.C. 365 (Fam. Div.), and *Pretty v. UK*, [2002] 2 F.L.R. 45 (E.C.H.R.).

⁹⁷ In the Torah, preservation of life supercedes all duties and prohibitions other than adultery, incest and shedding blood. In the Talmud, the possibility of saving life outweighs other considerations and permits risk to the lifesaver. In the New Testament, we are told to emulate Jesus who gave his very life for the sake of others. See N. Goolam, *supra*, note 90, and M. Halperin, "Organ Transplants from Living Donors" (1993) 27 Is. L.R. 566-587.

⁹⁸ S. Aksoy & A. Elmali, *supra*, note 64, at 219.

⁹⁹ See, K. Mason & G. Laurie, *supra*, note 63, at 483-484, J. Montgomery, *supra*, note 86, at 446, and *Re Attorney General's Reference (No. 6 of 1980)*, [1981] 1 All E.R. 1057 (H.L.).

¹⁰⁰ As argued by both J. Weisman, *supra*, note 81, at 613, and J. Dukeminier, "Supplying Organs for Transplantation" (1970) 68 Mich. L.R. 811, at 812. For statistics on the black market, see Berkeley, <http://sunsite3.berkeley.edu/biotech/organswatch>, which names Argentina, Brazil, China, Columbia, France, Germany, India, Italy, Mexico, Russia, S. Africa, Turkey, the UK and the USA as active in the market.

black market, with the consequence that they are not protected and face greater risk.¹⁰¹

- Technical skills in transplant surgery are growing exponentially (outpacing society's ability to supply¹⁰²) and most subject organs can be removed with minimal short-term¹⁰³ or long-term¹⁰⁴ health concerns if done properly.
- There may be good (non-therapeutic) reasons why originators are willing to accept some risk, and the law accepts this as relevant. For example, in *Re Y (Mental Incapacity: Bone Marrow Transplant)*,¹⁰⁵ the Court recognized emotional/psychological and social benefits to an incompetent donor, concluding that they outweighed the physical risk and the excision was therefore in her best interests.
- Society does not protect other potentially economically vulnerable people from pursuing dangerous occupations or activities (ie: soldiers, police officers, firefighters, miners, boxers, F1 drivers).¹⁰⁶ Surrogacy, which offers the closest analogy, is legally sanctioned.¹⁰⁷ Under surrogacy arrangements, a couple use the womb of another woman to produce a child. The surrogate undertakes a potentially risky, time-consuming and uncomfortable service which, although capable of being characterized as instrumentalization or commodification of the body/womb, is a valid participation in the statutorily tolerated market in reproductive labour and which is viewed as a socially useful

¹⁰¹ See N. Velasco, "Organ Donation and Kidney Sales" (1998) www.thelancet.com/search/search/isa (Feb. 10/04), D. Josefson, "Selling a Kidney Fails to Rescue Indians from Poverty" (2002) 325 B.M.J. 795, M. Friedlaender, "The Right to Sell or Buy a Kidney: Are We Failing Our Patients?" (2002) 359 Lancet 971-973, and J. Siegel-Itzkovich, "Israel Considers Paying People for Donating a Kidney" (2003) 326 B.M.J. 126.

¹⁰² D. Lamb, *supra*, note 47, at 1.

¹⁰³ T. Peters *et al.*, "Living Unrelated Kidney Donors: A Single Centre Experience" (1999) 13 Clin. Trans. 108-112, and T. Peters *et al.*, "One Hundred Consecutive Living Kidney Donors: Modern Issues & Outcomes" (2002) 16 Clin. Trans. 62-68, note a 2-8 day recovery period with a brief post-operative course of pain medication.

¹⁰⁴ See M. Halperin, *supra*, note 97, who cites F. Vincenti *et al.*, "Long Term Renal Function in Kidney Donors: Sustained Compensatory Hyperfiltration with No Adverse Effects" (1983) 36 Transplantation 626, D. Weiland *et al.*, "Information of 628 Living-related Kidney Donors at a Single Institution with Long Term Follow-up in 472 Cases" (1984) 16 T.P. 5, and J. Tapson, "The Risk of Donor Nephrectomy" (1985) 8 I.J.A.O. 13-16.

¹⁰⁵ [1997] 35 B.M.L.R. 111 (Fam. Div.).

¹⁰⁶ See M. Freeman, *supra*, note 3, at 5, who questions why we shouldn't make money from our bodies given that we permit it in the form of athletes and models.

¹⁰⁷ Surrogacy arrangements are recognized by s. 30 of the *Human Sterilization & Embryology Act 1990*. For a discussion on same see Commentary, "Surrogate Arrangements & Parental Orders" (1995) 3 M.L.R. 204-208, and Commentary, "Surrogate Contracts: Parentage" (1995) 3 M.L.R. 219-221.

undertaking.¹⁰⁸ A parallel service argument can be made for EBP primary transactions.

Thus, although some originator risk exists, it is minimal, within our capacity to regulate, and within a competent originator to accept in the course of helping another human being; for we are reminded that a “total” human – one who is social, rational and moral – is sensitive to imperatives to help others and accepts some risk in doing so.¹⁰⁹ All of this relieves physicians from interpreting non-maleficence as barring removal of certain body parts bound for market.¹¹⁰

(4) Justice

Justice, often linked with healthcare budgetary assessments, is accepted as meaning the fair, equitable and appropriate treatment of someone in light of what is owed to that person; it is used to balance competing claims and achieve a fair distribution of scarce resources.¹¹¹ In the EBP market context, the distribution of scarce EBPs would be thus measured.

Antagonists argue that it would be undesirable to permit a market because associated pressures would force resources to be distributed according to the relative economic power of the recipient. This need not be the case.

With respect to procurement, independent licensed third parties (ie: certified brokers, insurance organizations or trusts) who have contracted to do so, could solicit and purchase EBPs from originators within defined geographic and/or temporal boundaries. They could ensure compliance with existing guidelines relating to information and consent (ie: explain nature and risks of procedure, ensure understanding of same, confirm consent, absence of duress, right to withdraw consent),¹¹² oversee appropriate recuperative treatment, and distribute the EBPs to transplant teams *per* established criteria.¹¹³

¹⁰⁸ See D. Satz, “Markets in Reproductive Labour” (1992) 21 Phil. & Pub. Affairs 107-131, and L. Purdy, *Reproducing Persons* (USA: Cornell U. Press, 1996).

¹⁰⁹ D. Lamb, *supra*, note 47, at 105.

¹¹⁰ Which would be somewhat hypocritical given the number of cases in which patients are permitted to die (ie: *Airedale NHS Trust v. Bland*, *supra*, note 89, *Re C (Minor)(Wardship: Medical Treatment)*, [1990] Fam. 26 (Fam. Div.), and *Re B (Minor)(Wardship: Medical Treatment)*, [1981] 1 W.L.R. 1421 (C.A.)).

¹¹¹ S. Aksoy & A. Elmali, *supra*, note 64, and T. Beauchamp & J. Childress, *Principles of Biomedical Ethics*, 4th ed. (NY: OUP, 1994).

¹¹² See Articles 5-9 of the Biomedicine Convention and s. 3(2) of the old HOTA Regulations.

¹¹³ Market proponents have offered several suggestions for procurement and distribution and the separation of same. See J. Radcliffe-Richards *et al.*, *supra*, note 73, A. Barnett *et al.*, *supra*, note 74, and J. Weisman, *supra*, note 81, at

With respect to allocation, transplant teams could allocate EBPs to patients on national or regional waiting lists according to existing medical criteria, which includes considerations of length of time on waiting list, severity of need, probability of benefit/success (measured by disease/condition type, probable complications and ability to overcome same and histo-compatibility), and excludes discrimination on social status, lifestyle or behaviour.¹¹⁴

Thus, proper regulation of the process minimizes the procurement and allocation dangers of a property/market model and could fulfil the justice principle better than the current regime, which offers little incentive to donors and procurement officers, and little hope for patients.¹¹⁵

(5) Conclusion

Considering primary EBP transactions within the context of the four bioethical principles highlights many of the implications of recognizing property in our own EBPs. It challenges many of the arguments against recognizing property and provides an ethically sound case for extending such rights. In particular, a property model would further originator autonomy, promote beneficence toward patients, expose originators to acceptable risks and thereby comply with non-maleficence, and could be structured to ensure justice. A property model could improve the plight of patients without negatively impacting on originators. A complete absence of exploitation may be unachievable,¹¹⁶ but the existing system has not avoided exploitation. Ultimately, if adopting a property model could increase the supply of necessary EBPs for life-saving transplantation, denying it may be immoral.¹¹⁷

III. SPECIAL PROPERTY LAW CONCERNS RELATED TO RECOGNIZING PROPERTY IN OUR OWN EBPs.

A property model is more palatable if the nature of property law is understood. “Property” is a

618.

¹¹⁴ See WMA, *supra*, note 69, Articles 30 and 32, and the Canadian Medical Association, *Organ & Tissue Donation & Transplantation Policy* (1987) at www.cma.ca (Feb. 20/04).

¹¹⁵ A. Barnett *et al.*, *supra*, note 74, at 209-210. They also argue that the market would eventually correct the current imbalance such that supply and demand would be even and prices stable.

¹¹⁶ A. Campbell *et al.*, *supra*, note 76, at 57, feels it’s impossible to stamp out in a capitalist society.

¹¹⁷ J. Weisman, *supra*, note 81, at 618.

relationship to an item, not the item itself.¹¹⁸ “Property rights” are specific rights, including the right to exclude others, which attach to definable, identifiable, transferable items, and they can be full or limited.¹¹⁹ “Property law” is a complex social institution which organizes items and services for which there is greater potential demand than supply.¹²⁰ It has certain attributes which make it amenable to absorbing claims relating to EBPs:

- **Versatility:** It has proved versatile, metamorphosing over the centuries as a result of changing concepts of social and economic value, to address realty, chattels, intellectual products, personality and image, and other areas of human endeavour over which we wish to exercise personal control. Although various disciplines share common principles and overlap, they offer different causes of action and remedies, and could be further expanded.¹²¹
- **Limitability:** It recognizes moral limitations in the use of objects over which we have rights.¹²² Related to this moral awareness are legal limitations which it imposes on the use and enjoyment of property. As such, limits could be imposed on the rights over and use of EBPs so that divestiture against one’s interests could not be achieved (ie: divestiture of vital organs).¹²³
- **Sensitivity:** It is sensitive to and interacts easily with other areas of law, cooperating with public and private domestic and international law.¹²⁴ Unfettered enjoyment of property is restricted by traffic, planning, conservation, environmental and other public laws, and an EBP property model could be similarly sensitive.

¹¹⁸ P. Matthews, *supra*, note 35, and K. Gray, *Elements of Land Law* (London: Butterworths, 1987), at 8.

¹¹⁹ P. Matthews, *ibid*, at 193-195, J. Weisman, *supra*, note 81, at 610, R. Smith, *Property Law*, 3rd ed. (London: Longman, 2000), at 3, as well as *Blade v. Higgs* (1865), 11 E.R. 1474 (H.L.) and *National Bank Ltd. v. Ainsworth*, [1965] A.C. 1175 (H.L.).

¹²⁰ J. Harris, *supra*, note 11, at 56-57.

¹²¹ P. Matthews, *supra*, note 35, at 252-255, and K. Gray, *supra*, note 118, at 11, where it is noted that the changing objects of property has resulted in the abandonment of property in wives and slaves.

¹²² J. Harris, *supra*, note 11, at 60-61, K. Gray, “Property in Thin Air” (1991) C.L.J. 252, and S. Worthington, *Personal Property Law* (Oxford: Hart Publishing, 2000).

¹²³ See K. Mason & G. Laurie, *supra*, note 3, Commentary, *supra*, note 15, at 251, and P. Matthews, *supra*, note 35, at 252-256.

¹²⁴ S. Worthington, *supra*, note 122, at 3.

By extending “property rights” to EBPs, we recognize that originators have rights as against others, and that, within limits defined by law, they can alter or transfer their rights by agreement.¹²⁵

That is not to say that existing principles/mechanisms are sufficient, nor that those which might apply can do so unaltered.¹²⁶ Given the special status of EBPs, certain events/processes require attention, namely rights creation, transfer of rights, valuation of EBPs, and quality of the EBPs.

(1) Implications for Transferring Property Rights

An EBP property model would rest on the principle that one “owns” one’s body and can exclude all others from it. It would have to address the special requirements that EBPs demand.

First, it may stipulate that lawful transfer of title in EBPs requires a written contract between (1) originator, (2) procurement agent and (3) head of the surgical team (on behalf of the receiving health authority).

Second, it may require that all contracts contain certain standard statutory rights and obligations regarding information, consent, convalescence treatment, etc. For example, the procurement agent and surgeon could certify that existing information and consent protocols had been met and provide a health status certificate post-operatively.

Third, all contracts could be subject to scrutiny by and registration with the Human Tissue Authority (or some designated living transplant authority) and payment might be made to a special trustee prior to excision (thereby avoiding payment/title disputes and ensuring that the money can be easily recovered by the authority if the originator exercise’s his right to withdraw consent prior to the operation¹²⁷).

Fourth, contrary to existing property practices, the EBP model could stipulate that ownership, possession and title are inseparable.¹²⁸ In short, while subject parts/organs remain a part of the body (ie: are only notional EBPs), no third party can have any interest in them

¹²⁵ In support of this, see *Attorney General v. Nazira Levi*, Custodian File 1402/70 (unpublished), cited in J. Weisman, *supra*, note 81, at 621, wherein the Court stated that only once removed did a kidney become the object of a property right such that its transfer could be viewed as a gift under the law.

¹²⁶ J. Harris, *supra*, note 11, at 65, and S. Worthington, *supra*, note 122, at 3.

¹²⁷ A right widely accepted: L. Ross *et al.*, *supra*, note 76.

¹²⁸ For a discussion of these concepts, see S. Worthington, *supra*, note 122, ch. 2.

enforceable against the originator. Thus, although an originator could contract to have certain statutorily identified parts excised and could sell same to statutorily defined parties by way of statutorily structured written contracts,¹²⁹ the contract would remain executory and unenforceable against the originator until performance is complete (ie: the contract would not vest actionable title with the purchaser). Ownership, possession and title might pass to the health authority along with the EBP itself and then on to the recipient (researcher or patient), but special consideration of the exact *scintilla temporis* (moment of passing of title from originator to purchaser) would be necessary.

Fifth, the law would have to address those situations in which property typically transfers or is valued without the “owner’s” consent. For example:

- **Bankruptcy:** Following an assignment in bankruptcy, there is typically an accounting and estate auction, the funds from which are used to satisfy creditors. With respect to valuing estates, the statute could deny recognition of property in the bankrupt’s body or in EBPs held or contracted for by a health authority; there could be no forced removals or sales.¹³⁰
- **Financial Aid:** The market value of EBPs could be statutorily exempt from the calculation of assets of those applying for social assistance or other financial aid.¹³¹
- **Wills & Estates:** Similarly, EBPs could be waived from assessment of a deceased’s estate. However, the statute might recognize (1) testamentary instruments which donate EBPs to a health authority, and (2) executor/administrator sales of EBPs of a corpse where such sales are not contrary to express testamentary directions, in which case the purchase funds could form part of the residue of the estate.

In short, EBPs should not be involuntarily valued, auctioned or removed by third parties and specific performance of contracts would have to be banned.¹³² Such restrictions have practical and

¹²⁹ Such statutory limitation/definition of that which can be consented to is common. For example, see the *Offences Against the Person Act 1861*, the *Abortion Act 1967*, the *Tattooing of Minors Act 1969*, and the *Prohibition of Female Circumcision Act 1985*, and others. In addition, see *R. v. Donovan*, [1934] All E.R. 207 (C.A.).

¹³⁰ See N. Zohar, *supra*, note 51, at 543, who bases this restriction on moral grounds.

¹³¹ *Ibid*, at 543.

¹³² J. Weisman, *supra*, note 81, at 622.

moral grounds (ie: they would infringe the very autonomy and dignity intended to be recognized).

Finally, the law could recognize that an originator has no right to the return of EBPs once they are removed, nor any right of recovery against innocent third party recipients. Indeed, it is not uncommon for one who has property rights in something to nonetheless not have an automatic right of recovery enforceable as against others.¹³³ Given the contract/transfer mechanisms envisioned, illegal removals would be rare, but compensatory recovery in such circumstances could be limited to those who committed the assault or failed to comply with contract terms.¹³⁴

(2) Implications for Valuing the Asset

Another special problem is that of valuing EBPs. Antagonists of the property model argue that it would be wrong to value EBPs as if they were physical commodities, the body having value/significance beyond the physical. They should not be subject to the vagaries of a market economy. However, we frequently value (through the market) items with significance beyond the material/physical:¹³⁵

- (1) wedding rings (highly emotive and sentimental) are bought and sold;
- (2) damage to reputation (a highly personal and intangible commodity) is subject to economic analysis;
- (3) physical injuries (commonly viewed as impossible to adequately compensate) are given monetary value and subjected to market pressures; and
- (4) EBTs held by third parties (ie: naturally occurring chemical compositions isolated in their pure state) are subject to fluctuating market valuations.

Further, the market is pervasive in our global community. Our health, development and

¹³³ R. Smith, *supra*, note 119, at 13.

¹³⁴ G. Dworkin & I. Kennedy, *supra*, note 36, at 310, suggest that fears about stolen EBPs are overestimated.

¹³⁵ See both J. Herring, "Giving, Selling and Sharing Bodies" 43-61, and G. Radick, "Discovering and Patenting Human Genes" 63-78, at 65, both in A. Bainham *et al.* (eds.), *supra*, note 2.

aspirations are bound up in relationships to others and influenced by the market; everything we are and hope to achieve is interconnected and valued in some way.¹³⁶ Even healthcare, including scarce life saving resources, is distributed according to market principles and pressures.¹³⁷

As such, although EBPs have personal/moral significance/value, they are amenable to market valuation and subjecting them to same (and permitting originators to control and benefit from them) does not diminish their special status, but gives recognition to that special status and its enduring nature.¹³⁸ The challenge for a property model is to be sensitive to that special status (that non-economic value). This might be done by limiting the number of parties able to operate in the market, or by identifying non-monetary forms of compensation (ie: tax deductions, increased medical insurance coverage, queue-jumping for like EBPs, funeral expense coverage, or a combination thereof in addition to expense coverage, either tied to or in lieu of monetary payment).¹³⁹

(3) Implications for Quality / Merchantability

Antagonists of the property/market model argue that it would lead to the sale of defective organs by those in financial stress and therefore in poor health.¹⁴⁰

Quality could be assured by providing a thorough statutory screening process whereby originators are interviewed and examined so as to obtain information applicable to compatibility, general health and the existence of various diseases and conditions. Where originators successfully complete these tests, patient claims relating to rejection or failure could be barred.¹⁴¹ In any event, originators – whose files would be maintained by the Human Tissue Authority – could remain anonymous.¹⁴²

¹³⁶ J. Herring, *ibid*, at 44.

¹³⁷ See N. Zohar, *supra*, note 51, at 545-551.

¹³⁸ G. Laurie, *supra*, note 78, at 317.

¹³⁹ Suggestions for methods of payment can be found in A. Jonsen, "Ethical Issues in Organ Transplantation" in R. Veatch (ed.), *Medical Ethics*, 2nd ed. (London: Jones & Bartlett, 1997) 239-274, at 253, and J. Kahn, "Organ Donation – We'll Make It Worth Your While" (1999) at www.cnn.com/HEALTH/bioethics/9905/organ.donate/template.html (Feb. 18/04).

¹⁴⁰ See M. Brams, "Transplantable Human Organs: Should Their Sale be Authorized by Statute?" (1977/78) 3 Am. J. of Law & Med. 183, D. Meyers, *The Human Body and the Law*, 2nd ed. (Edinburgh: UEP, 1990), and others, who point to the lower quality blood obtained by sale as compared to donation.

¹⁴¹ In short, the *Sale of Goods Act 1979* (UK), 1979, c. 54, and the *Supply of Goods and Services Act 1982* (UK) 1982, c. 29, would be suspended as they relate to claims against EBP originators by health authorities or patients.

¹⁴² A status affirmed in the blood donor context in *AB v. Scottish National Blood Transfusion Service*, [1990]

Originators aside, there is precedent for the applicability of the general law of medical negligence and consumer protection against the health authority and transplant team. In *A v. National Blood Authority*,¹⁴³ the Court held that the plaintiff blood recipient who contracted hepatitis C from contaminated blood products was entitled to rely on the *Consumer Protection Act 1987* as against the Authority. Similarly, in *Veedfald v. Arhus Amstokommune*,¹⁴⁴ the E.C.J. held that product liability did not attach to a donated kidney, but rather to the processes and applications to which the kidney and the patient were subjected.

Thus, appropriate screening measures and existing precedent in the blood and transplant fields offer solutions to the problem of ensuring EBP quality and avenues of compensation for lack of same.

(4) Conclusion

The above are just some of the legal and practical implications of recognizing property rights and primary transaction in our own EBPs. Although the property regime is broad and flexible, any shift to a property model relating to originators would best be governed by a statute which recognizes and accounts for the *sui generis* nature of EBPs. Some tentative solutions to the highlighted problems/issues are offered, but there are other concerns that might arise for originators, physicians, recipients and lawyers working “at the coal face”. What the above demonstrates, however, is that these problems can be addressed in a reasonable and rational manner which recognizes the dignity of the originator and does not overly stretch the limits of the property system.

CONCLUSION

*“Whoever saves a life, it would be as if he saved the life of all people.”*¹⁴⁵

S.C.L.R. 263.

¹⁴³ [2001] 3 All E.R. 289 (Q.B.).

¹⁴⁴ (2001), 66 B.M.L.R. 1 (E.C.J.).

¹⁴⁵ Quran, 76:9.

This article has considered one particular implication of recognizing property in our own EBPs, namely the ability of originators of EBPs to enter into primary transactions to sell their EBPs to third parties during their life. An assessment of its ethical foundation and its interaction with certain property-specific concepts demonstrates that a *sui generis* property system applicable to EBPs is neither unethical nor beyond the contemplation of existing legal principles. A property model properly conceived could result in:

- (1) originators finally achieving autonomous status and equal standing in the burgeoning (and lucrative) global medico-scientific market; and
- (2) patients finally receiving the best treatment within reasonable timeframes.

It could broaden both the scope of bodily control and individual economic rights and activities without seriously endangering the special position of the body and its parts in the human psyche and social interaction.

Attempts to limit originator rights based on instinctive feelings of revulsion, “sniff-test” moral reactions or references to vague ethical concepts are not appropriate.¹⁴⁶ In *Dudgeon v. UK*,¹⁴⁷ the Court specified that it is improper for the state to prohibit actions simply on the basis that those actions shock, offend or disturb the general public. In any event, general opposition to expanding the rubric of property is “irrational” in that it is “decades too late”.¹⁴⁸ Property and property rights already attach to our bodies: we talk of “owning” our body (consent and refusal of treatment supports this position), we can “gift” our EBPs (the procedure for which mimics gifting in any property text), and third parties can own our corpses, EBPs and EBTs. Today’s youth accept that originators should be able to benefit financially from their EBTs and there are many examples of peoples and communities moving toward property models of self-ownership so as to protect their interests.¹⁴⁹ These shifts are evidence of the social, moral and ethical change that is necessary for the continued health of a modern, pluralist society, and they should not be ignored.

¹⁴⁶ See J. Harris, “Clones, Genes and Human Rights” in J. Burley (ed.), *The Genetic Revolution and Human Rights* (Oxford: OUP, 1999) 61-94, for a critique of “olfactory reasoning”.

¹⁴⁷ (1981), 4 E.H.R.R. 149 (E.C.H.R.).

¹⁴⁸ G. Dworkin & I. Kennedy, *supra*, note 36, at 316, discussing arguments against genetic “intermeddling”.

¹⁴⁹ G. Laurie, *supra*, note 78, at 315 and 319-324.